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Legal and Technical Commission

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Consideration of additional measures to improve efficiency in the current process for reviewing annual reports

Evaluation of annual reports of contractors and monitoring compliance with plans of work for exploration

Note by the secretariat

I. Introduction

1. The present note provides a review of the relevant rules, regulations and procedures of the Authority and the related responsibilities of the Council, the Legal and Technical Commission and the secretariat in relation to the evaluation of annual reports by contractors and monitoring compliance with plans of work. The note also outlines the way in which the Commission operates in practice and includes a review of certain improvements to the process that have already been made and suggestions for further improvement. The objective is to provide the Commission with a better understanding of its responsibilities and thus facilitate the more effective discharge of its functions under the United Nations Convention on the Law of the Sea with respect to the evaluation of annual reports and the review of the implementation of programmes of activities.

2. A related report (ISBA/24/C/5) is to be presented to the Council at its meeting in March 2018 in the light of the Council's request to be provided with further details on cases of non-compliance in circumstances in which the relevant contractor has not complied with a specific request in a letter received from the Secretary-General, including details regarding the relevant contractor, details with respect to repeated instances of non-compliance and recommendations to ensure compliance in the future (see ISBA/23/C/18). It may be noted that the Council's request arose in response to the report of the Chair of the Commission on the work of the Commission in 2017, in which it was noted that there were some cases of non-compliance with regard to reporting requirements.

* ISBA/24/LTC/L.1.

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II. Monitoring compliance with plans of work for exploration

3. Under article 162, paragraph 2 (l) of the Convention, the Council shall exercise control over activities in the Area in accordance with article 153, paragraph 4, of the Convention and the rules, regulations and procedures of the Authority. Under article 153, paragraph 4, the Authority is required to exercise such control over activities in the Area as is necessary for the purpose of securing compliance with the relevant provisions of part XI of the Convention and the annexes relating thereto, the rules, regulations and procedures of the Authority and the approved plans of work.

4. Monitoring compliance with plans of work for exploration approved in the form of contracts is also one of the functions of the Authority pursuant to section 1, paragraph 5 (c), of the annex to the Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea of 10 December 1982 (1994 Agreement). At present, the primary monitoring mechanisms available to the Authority are the annual reports submitted by contractors pursuant to section 10 of the standard clauses for exploration contracts and the periodic reviews of the plans of work for exploration under section 4.4 of the standard clauses. In due time, the Council will be required to establish an appropriate inspection mechanism pursuant to article 162, paragraph 2 (z), of the Convention. Although such an inspection mechanism does not exist at present, it is expected that the establishment thereof will be addressed in the context of the exploitation regulations.

A. The plan of work for exploration

5. The plan of work for exploration is the fundamental document by which a contractor sets out the objectives of its proposed exploration programme. Pursuant to the regulations on prospecting and exploration, the plan of work for exploration comprises a general description and a schedule of the proposed exploration programme, including the programme of activities for the immediate five-year period, as well as a description of a programme for oceanographic and environmental baseline studies, taking into account any recommendations issued by the Commission, a preliminary environmental impact assessment of the proposed exploration activities and a schedule of expected yearly expenditure in respect of the programme of activities.

6. Upon approval of the plan of work by the Council, the programme of activities for the immediate five-year period becomes schedule 2 of the contract for exploration.

7. Under sections 4.1 and 4.2 of the standard clauses, the contractor is required to adhere to the time schedule stipulated in its programme of activities and to spend in each contract year no less than the amount specified. The programme of activities, including expenditure, may be modified by a contractor with the consent of the Authority, in so far as any changes may be necessary and prudent in accordance with good mining industry practice, taking into account the market conditions for the constituent metals and other relevant global economic conditions.

8. In accordance with section 4.4 of the standard clauses, the contractor and the Secretary-General shall jointly undertake a review of the implementation of the plan of work for exploration. The Secretary-General may require the contractor to submit such additional data and information as may be necessary for the purposes of the review. Following the review, the contractor is required to make any necessary adjustments to its plan of work and to indicate its programme of activities for the following five years, including a revised schedule of expected yearly expenditure. Schedule 2 of the contract is then adjusted accordingly.

9. In carrying out its programme of activities, the contractor must implement, as far as reasonably practicable, any recommendations that may be issued from time to time by the Commission. The ability of the contractor to implement such recommendations, however, will primarily be linked to the specific programme of activities to which the contractor has committed itself under schedule 2 of the contract. Environmental baseline data, for example, would be collected as exploration activities progress and develop (sect. 5.3 of the standard clauses). Consequently, it is a prerequisite that contractor programmes of activities be current and activities clearly documented in order to facilitate the effective monitoring of the implementation of such programmes.

B. Annual reporting

10. Under the exploration contract, the contractor is required to submit an annual report to the Secretary-General within 90 days of the end of each calendar year covering its programme of activities in the exploration area (sect. 10.1 of the standard clauses). The report must be in the format recommended from time to time by the Commission. The Commission has, in connection with this annual reporting obligation, issued recommendations for the guidance of contractors on the content, format and structure of annual reports (ISBA/21/LTC/15) and on the reporting of actual and direct exploration expenditure (ISBA/21/LTC/11). The former set out the general requirements for annual reports together with specific guidance by resource category, including detailed templates in Microsoft Excel format for the submission of data. The latter provide guidance on the presentation of annual financial information to verify contractor compliance with its schedule of expected annual expenditure under a plan of work.

11. In accordance with current practice, annual reports by contractors are to be submitted by 31 March each year and are then subject to analysis by technical staff within the secretariat. Simultaneously, the reports and supporting documentation are loaded onto a secure website, accessible only to members of the Commission, for their private study and review. After review, the Commission prepares an evaluation report for submission to the Secretary-General. That evaluation contains the Commission's general comments on the annual reports, which are subsequently forwarded to the Council, and specific comments, where necessary, on the reports of each individual contractor. Those comments, which may include questions relating to data or advice on scientific methodologies, are conveyed to the contractors by the Secretary-General, usually in the form of a letter, but at other times as part of a bilateral consultation. Responses by the contractors and any follow-up action taken are reflected in the annual report of the following year.

12. Certain deficiencies in the current reporting process were highlighted in the final report on the periodic review of the Authority pursuant to article 154 of the Convention. Those conclusions were supported by comments by the Secretary-General and were reflected as an item for action in the decision of the Assembly of 18 August 2017 relating to the final report on the first periodic review of the international regime of the Area pursuant to article 154 (ISBA/23/A/13).

13. Among the measures taken to date to improve efficiency are the establishment of a dedicated contract management unit to streamline internal processes and improve the flow of communication between contractors and the Authority and a regular annual meeting of contractors at which issues of mutual concern can be discussed. The launch of the Authority's new database, scheduled for 2018, is expected to improve significantly the flow of data and information among contractors, the Secretary-General and the Commission. The new database will also result in greater transparency, with secure access to confidential data for authorized users and an

intuitive and informative website that includes a geographic information system for public access to non-confidential data and information.

III. The role of the organs of the Authority

14. The various organs of the Authority have specific and clearly defined roles and responsibilities in relation to monitoring compliance with plans of work for exploration, which are derived from the Convention, the 1994 Agreement, the regulations and the standard clauses for exploration contracts.

15. The responsibilities of the Secretary-General are to:

(a) Review annual reports of contractors and require contractors to submit additional data and information as necessary (sect. 10 of the standard clauses);

(b) Submit data and information from environmental monitoring programmes to the Legal and Technical Commission for consideration pursuant to article 165, paragraph 2 (d), of the Convention;

(c) Agree on adjustments to the programme of activities under schedule 2 of the contract (sect. 4.3 of the standard clauses);

(d) Undertake jointly with the contractor a periodic (five-year) review of the implementation of the plan of work for exploration, and to agree to a revised schedule 2 (sect. 4.4 of the standard clauses);

(e) Inspect vessels and installations (sect. 14.2 of the standard clauses), and provide relevant information to the contractor and sponsoring State(s) arising from the inspection reports (sect. 14.7 of the standard clauses);

(f) Report incidents giving rise to emergency orders and take immediate temporary measures (regulation No. 33);[1]

(g) Notify member States of a termination or change of sponsorship (see regulation No. 29).

16. The functions of the Legal and Technical Commission are set out in article 165, paragraph 2, of the Convention and are closely related to the functions of the Council under article 162. The system is designed to ensure that, in making decisions on important issues, the Council acts on the basis of the best available scientific and legal advice. The obligations placed on the Commission are mainly of an advisory or recommendatory nature and fall into the following four broad functional categories:

(a) Reviewing and making recommendations on plans of work for exploration (see art. 165, para. 2 (b));

(b) Supervising activities in the Area (art. 165, paras. 2 (a, c, i, j, k and m));

(c) Formulating and reviewing rules, regulations and procedures (art. 165, paras. 2 (f and g));

(d) Assessing the environmental implications of activities in the Area (art. 165, paras. 2 (d, e, h and l)).

17. Two of the general functions of the Commission under article 165 are directly related to the implementation of plans of work for exploration, namely the responsibilities under article 165, paragraph 2 (c) to supervise, upon the request of

[1] For the purposes of the present note, reference is made to the regulations on prospecting and exploration for polymetallic nodules in the Area (ISBA/19/C/17, annex).

the Council, activities in the Area, and under article 165, paragraph 2 (d), to prepare assessments of the environmental implications of activities in the Area.

18. Consistent with article 165, paragraph 2, the regulations empower the Commission to issue recommendations of a technical or administrative nature for the guidance of contractors to assist them in the implementation of the rules, regulations and procedures of the Authority. It is a contractual requirement that such recommendations be observed as far as reasonably practicable.

19. In order to enable the Commission to carry out its responsibility to prepare assessments of the environmental implications of activities in the Area pursuant to article 165, paragraph 2 (d), and make appropriate recommendations to the Council on the protection of the marine environment, data and information from environmental monitoring programmes submitted by contractors must be transmitted by the Secretary-General to the Commission (regulation 32, para. 2).

20. The Commission must also consider the report of the Secretary-General on the periodic review of the implementation of plans of work for exploration (regulation 28, para. 3).

21. The functions of the Council are, inter alia, to:

(a) Approve plans of work in accordance with paragraph 11 (a) in section 3 of the annex to the 1994 Agreement;

(b) Consider the report of the Secretary-General on the periodic reviews of the implementation of plans of work for exploration (regulation 28, para. 3);

(c) Invite the attention of the Assembly of the Authority to cases of non-compliance (art. 162, para. 2 (a));

(d) Exercise control over activities in the Area in accordance with article 153, paragraph 4, and the rules, regulations and procedures of the Authority (art. 162, para. 2 (l));

(e) Institute proceedings on behalf of the Authority before the Seabed Disputes Chamber in cases of non-compliance (art. 162, para. 2 (u));

(f) Establish appropriate mechanisms for directing and supervising a group of inspectors who shall inspect activities in the Area to determine whether part XI of the Convention, the rules, regulations and procedures of the Authority and the terms and conditions of any contract with the Authority are being complied with (art. 162, para. 2 (z));

(g) Suspend or terminate contracts if, in spite of written warnings from the Authority, a contractor has conducted its activities in such a way as to result in serious, persistent and wilful violations of the fundamental terms of the contract, part XI of the Convention, the 1994 Agreement and the rules, regulations and procedures of the Authority;

(h) Alternatively, or in the event of lesser violations, impose monetary penalties upon a contractor proportionate to the seriousness of the violation.

IV. Discussion and recommendations

22. A careful review of the relevant provisions of the Convention and the regulations revealed a clear separation of the functions in the organs of the Authority between licensing (approving plans of work in the form of contracts) and subsequent compliance with and enforcement of such contracts. For example, the functions of

directing and supervising an inspectorate, as well as taking enforcement action, rest exclusively with the Council.

23. The day-to-day responsibility for managing the implementation of plans of work for exploration and for reporting any instances of non-compliance lies with the Secretary-General, who exercises the powers and functions allocated to that position in a manner consistent with the Convention and the regulations. An inherent conflict of interest exists when the body that approves contracts for exploration and the financial terms thereof contracts is the same body that is responsible for ensuring compliance. In view of the potential consequences of non-compliance (see ISBA/24/C/5), it is important that the difference between those activities be well articulated and that the process for monitoring compliance and the responsibilities of the various organs of the Authority in relation thereto be clearly understood.

24. The annual reporting process and the quinquennial periodic review undertaken by the Secretary-General serve as important monitoring tools. They facilitate the measurement of the progress of the exploration work carried out on an annual basis against a contractor's approved plan of work, including its programme of activities, and serve to highlight proposed adjustments to that programme. The annual reporting process also provides the Authority with much needed data and information, for example, to evaluate, analyse and assess the environmental effects of exploration activities and to help the Authority to formulate relevant rules, regulations and procedures concerning the protection of the marine environment and safety. This is particularly important in connection with the data and information made available to the Commission to facilitate the fulfilment of its obligations under article 165, paragraph 2, of the Convention to provide guidance and recommendations to the Council.

25. In terms of distinguishing non-compliance from inadequate or incomplete performance against an approved plan of work, a more effective validation process is needed to determine whether a matter identified as potential non-compliance is, in fact, a case of non-compliance with the regulations. Improvements to the current process are ongoing, but a clearer understanding as to why certain reporting requirements have not been met or fulfilled would improve the Authority's understanding of the programmes and timelines of contractors. One way to achieve that would be by requiring contractors to provide more clearly defined programmes of activities with clear objectives that can be measured.

26. The Commission is invited to:

(a) Take note of the roles and responsibilities of the various organs engaged in monitoring compliance with the plans of work and its own role in monitoring the implementation of contractor programmes of activities as part of the annual reporting process;

(b) Note the improvements made to the annual reporting process, including the process of evaluating the annual reports;

(c) Provide additional guidance to the secretariat regarding the information needs of the Commission with respect to annual reporting by identifying subject areas and matters requiring greater and more targeted focus, and request the Secretary-General to further streamline the analysis of annual reports for use by the Commission;

(d) Request the Secretary-General to provide further details and analysis to the Commission on the implementation of the five-year programme of activities;

(e) Recommend how information relating to the activities of contractors may best be transmitted to the Council, in accordance with the responsibilities of the

Commission pursuant to article 165 of the Convention, to enable the Council to discharge its functions under article 162, paragraph 2;

(f) Request the Secretary-General to take up with the contractors the need for more clearly defined programmes of activities, reflecting the request made by the Assembly during the twenty-third session (see ISBA/23/A/13);

(g) Provide the Secretary-General with additional guidance to derive further benefit from and drive the improvement of the existing process.